

**THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF WEST VIRGINIA  
AT MARTINSBURG**

**CLYDE EDWARD BROWN,**

**Petitioner,**

**v.**

**CIVIL ACTION NO. 3:04CV64-4  
CRIMINAL ACTION NO. 3:02CR35  
(BROADWATER)**

**UNITED STATES OF AMERICA,**

**Respondent.**

**ORDER ADOPTING  
MAGISTRATE'S REPORT AND RECOMMENDATION**

The above styled matter came before the Court for consideration of the a petition under 28 U.S.C. §2255 for writ of habeas corpus by a person in federal custody filed on July 26, 2004. Magistrate Judge James E. Seibert reviewed the claims made in the petition and issued his Report and Recommendation on June 21, 2005. Petitioner filed objections thereto on July 28, 2005 and March 3, 2006. In the interests of justice and in accordance with 28 U.S.C. § 636(b)(1), the Court has conducted a *de novo* review.

The Court, after reviewing the above, is of the opinion that the Magistrate Judge's Report and Recommendation should be and is hereby **ORDERED** adopted (Document No. 586). Petitioner objects to the Magistrate's finding that Booker and Hughes should not be applied retroactively to cases on collateral review. United States v. Booker, 1543 U.S. 220 (2005); United States v. Hughes, 401 F.3d 540, 546 (4th Cir.2005). Petitioner argues that the holdings should be applied to the instant case. The Court finds that the decision in Booker should not be applied retroactively, for the reasons stated in the Magistrate's Report and Recommendation. The Court further notes, that because Brown's sentence was based on facts admitted by stipulation in his plea agreement and he failed to

make a showing of actual prejudice due to the sentencing guideline's mandatory application, the Petitioner would not be entitled to relief under Booker if that decision's holdings were applied to this case.

The Court, therefore, **ORDERS** that the Petitioner's Motion Under 28 U.S.C. §2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Document No. 562), be **DENIED WITH PREJUDICE** based on the reasons set forth in the Magistrate Judge's Report and Recommendation, and **STRICKEN** from the active docket of this Court. Petitioner's Motion for Expedited Relief (Document No. 594) is **DENIED as MOOT**.

The Clerk is directed to transmit true copies of this Order to the petitioner, counsel of record herein, and to Magistrate Judge Seibert.

**DATED** this 10<sup>th</sup> day of May 2006.

  
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**W. CRAIG BROADWATER**  
**UNITED STATES DISTRICT JUDGE**